

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
CHESTER HOBURG,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent.

PCHB Nos. 80-182 & 80-184

**FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

This matter, the appeal from the denial of two applications for flood control zone permits, came before the Pollution Control Hearings Board, Nat Washington, Chairman, and David Akana (presiding), at a formal hearing in Everett on April 1, 1981, and in Seattle on May 15, 1981.

Appellant was represented by his attorney, Benjamin L. Westmoreland; respondent was represented by Robert V. Jensen, assistant attorney general. Court reporters Doris Stults and Kim Otis recorded the proceedings.

1 Having heard or read the testimony, having examined the exhibits,
2 and having considered the contentions of the parties, the Board makes
3 these

4 FINDINGS OF FACT

5 I

6 Respondent is an agency of the state of Washington created and
7 existing under the provisions of chapter 43.21A RCW and vested by said
8 chapter with the powers, duties, and functions provided for in
9 chapter 86.16 RCW, the State Flood Control Zone statute.

10 II

11 By order dated August 12, 1935, respondent established Snohomish
12 Flood Control Zone number No. 5. This order is not challenged. All
13 of the appellant's properties involved in this matter lie within the
14 area so delineated within the foregoing flood control zone.

15 III

16 Appellant is the owner of two parcels of property located near
17 Monroe, in Snohomish County, Washington. The contiguous parcels are
18 the subject of two flood control permit applications, Nos. 3990-5 and
19 3992-5. The parcels are pieces of a 15-acre tract located in section
20 14, township 27 north, range 6 E.W.M., Snohomish County. The parcels
21 are located in a rural agricultural use zone under local zoning. A
22 concrete silo and an old barn are located on the parcel described in
23 application No. 3992-5.

24 Appellant, who trades and invests in real estate, intends to
25 construct, operate, and maintain a residence on each of the parcels.
26 He knew that the subject properties were located within a flood plain

1 at the time of his purchase. Appellant also owns 40 acres of land in
2 section 12 nearby on which is situated a home for himself and another
3 home for his parents.

4 IV

5 After respondent received the applications, the properties were
6 viewed, elevations checked and U.S. Army Corps of Engineers maps
7 consulted. The maps were of a preliminary nature and subject to
8 revision. Based upon its independent evaluation, respondent concluded
9 that no area described within the two applications were situated
10 outside of the 100-year frequency floodway. An updated map, received
11 by respondent 13 months later and still of a preliminary nature,
12 continued to locate the property within the 100-year frequency
13 floodway.

14 V

15 The U.S. Army Corps of Engineers maps used by respondent in its
16 consideration of the two applications were not formally adopted, by
17 reference or otherwise, by respondent as a portion of its
18 administrative code.

19 VI

20 The 100-year frequency flood elevation through the center of the
21 properties is estimated to be at 46 feet plus or minus 1.25 feet mean
22 sea level on both U.S. Army Corps of Engineers maps. Appellant's
23 evidence shows that the 15-acre parcel is no higher than 44 feet and
24 consequently is lower in elevation than the moving water in a 100-year
25 frequency flood.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER

1 Respondent's conclusion that the instant tract is subject to
2 flooding is further corroborated by neighbors who saw the 15-acre
3 tract under water on three separate occasions. Those flood events,
4 although severe, did not reach the magnitude of a 100 year-frequency
5 flood.

6 VII

7 Appellant cites other permits issued within a mile by respondent
8 for structures located in the 100-year frequency floodway. These
9 permits were issued before the first series maps by the U.S. Army
10 Corps of Engineers were available to respondent, on or about August,
11 1979, and/or issued thereafter for non-residential structures, such as
12 barns and sheds. Respondent did allow the extension of a permit for
13 one year to October, 1980, for a short plat, however.

14 The permits described do not establish that appellant was treated
15 in a unlawful manner, or that permits should have been granted to him.

16 VIII

17 Any Conclusion of Law which should be deemed a Finding of Fact is
18 hereby adopted as such.

19 From these Findings the Board comes to these

20 CONCLUSIONS OF LAW

21 I

22 Appellant's sites are located within a duly constituted flood
23 control zone of this state. Appellant intends to construct, operate,
24 or maintain a work or structure on each of the sites within a flood
25 control zone. Accordingly, a permit is required to construct,

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER

1 operate, or maintain any work or structure within such flood control
2 zone. RCW 86.16.080.

3 II

4 Appellant contends that the maps provided to respondent by the
5 U.S. Army Corps of Engineers are required to be adopted as a portion
6 of the administrative code in accordance with RCW 86.16.067 and
7 86.16.070 before such maps may be used by respondent. Those
8 provisions of the statute refer only to the establishment of flood
9 control zones. The instant flood control zone has not been altered or
10 revised contrary to the statutory requirements.

11 Within a flood control zone, respondent can regulate the
12 construction, operation or maintenance of any proposed work or
13 structure by permits issued "in accordance with such general rules and
14 regulations as shall be established and promulgated for the purpose
15 under the provisions of this chapter." RCW 86.16.080. Respondent has
16 established such a permit system. Chapter 508-60 WAC. Therein,
17 respondent distinguishes between "floodway" and "floodway fringe" area
18 within a flood control zone. WAC 508-60-010; 508-60-030. The method
19 recognized to locate the geographical limits of flooding, and the
20 floodway, is essentially statistical. The geographical limits of the
21 floodway and floodway fringe are dynamic and can change over the years
22 as a result of natural and artificial forces. We conclude that
23 respondent can use any source of technical information, including the
24 U.S. Army Corps of Engineers maps, which may assist it in any manner
25 to locate the 100-year frequency floodway. The references used are
26 not required to be formally adopted as rules.

1 III

2 WAC 508-60-040 provides that applications for permits for any
3 works or structures upon the floodway must comply with all of the
4 following requirements:

5 (1) The structure or works are designed so as not to
6 be appreciably damaged by flood waters;

7 (2) The structures or works shall be firmly anchored
8 or affixed to the realty in order to prevent
9 dislocation by flood water and damage the life, health
10 and property.

11 (3) The structure or works will not adversely
12 influence the regimen of any body of water by
13 restricting, altering, hindering or increasing flow of
14 the flood waters in the floodway or flood channel
15 expected during a flood up to a magnitude of one
16 hundred year frequency...

17 (4) The structure or works are not designed for, or
18 will not be used for either (a) human habitation of a
19 permanent nature or (b) uses associated with high flood
20 damage potential... .

21 Appellant's works or structures are clearly intended for human
22 habitation of a permanent nature. Such proposed works or structures
23 are situated within the 100-year frequency floodway. Accordingly, the
24 proposed works or structures are prohibited by WAC 508-60-040(4) and
25 the permit applications were properly denied.

26 IV

27 Appellant further contends that chapter 86.16 RCW does not
prohibit a use and is, in addition, unconstitutional. The
constitutional issue raised cannot be resolved by this Board.
However, Mapleleaf Investors, Inc., vs. Department of Ecology, 88
Wn.2d 726 (1977) appears to resolve the contentions against appellant.

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1 We have considered appellant's remaining contentions and find them
2 to be without merit.

3 V

4 Any Finding of Fact which should be deemed a Conclusion of Law is
5 hereby adopted as such.

6 From these Conclusions the Board enters this

7 ORDER

8 The Department of Ecology's action denying flood control zone
9 permits for applications Nos. 3990-5 and 3992-5 are each affirmed.

10 DONE this 3rd day of August, 1981.

11 POLLUTION CONTROL HEARINGS BOARD

12
13 
14 NAT W. WASHINGTON, Chairman

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16 
17 DAVID AKANA, Member

18
19
20 (Did not participate)
21 GAYLE ROTHROCK, Member

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25
26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW & ORDER